80-1106

Supreme Court, U.S.
FILED
DEC 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

.....Term, 19.....

No.

AUGUSTINE CASTELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Trial Court err in violation of Petitioner's right to due process by refusing to permit defense cross examination of witnesses or to admit defense evidence, each bearing on the absence of Petitioner's criminal intent with respect to the single year of which he was convicted.

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. Augustine Castelli, at No. 80-1986.

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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued a Judgment Order on November 6, 1980. This Order is contained in the Appendix at pp. 1a-2a.

STATEMENT OF JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered by the Court, per Gibbons, J., on November 6, 1980.

The statutory provision which [the Petitioner believes] confers jurisdiction on this Honorable Court to review the judgment in question by Writ of Certiorari is Title 28 United States Code §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 United States Code, Section 7201 provides:

> Any person who willfully attempts in any manner to

evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioner, AUGUSTINE CASTELLI, was charged in a three count indictment returned at Criminal No. 80-64 in the United States District Court for the Western District of Pennsylvania, with attempting to evade and defeat his federal income taxes for the years 1973, 1974, and 1975, in violation of Title 26 United States Code, Section 7201.

Petitioner was acquitted of Counts 1 and 2 of the indictment after a jury trial and convicted by a jury on Count 3, for attempting to evade and defeat his federal income taxes for the years 1975, on May 20, 1980. On June 24, 1980 he was sentenced to

a term of imprisonment of four (4) years, suspended on condition that the Petitioner serve six (6) months in a jail type institution, with no fine or costs.

Notice of Appeal was filed by Petitioner's trial counsel on June 26, 1980. Petitioner's case was submitted on briefs without oral argument at the direction of the Circuit, and the Court of Appeals for the Third Circuit, per Gibbons, J., entered a Judgment Order on November 6, 1980, affirming Petitioner's judgment of conviction. This Order is set forth in the Appendix at pages 1a-2a.

This Petition, for a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit, followed.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT

IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS, THE TRIAL COURT ERRED IN REFUSING TO PERMIT DEFENSE CROSS EXAMINATION OF A PROSECUTION ACCOUNTANT WITNESS OR TO ADMIT DEFENSE EVIDENCE, EACH BEARING ON THE ABSENCE OF PETITIONER'S CRIMINAL INTENT WITH RESPECT TO THE SINGLE YEAR OF WHICH HE WAS CONVICTED.

A. Contention of the Parties

The prosecution was predicated on the bank deposit method, the Government contending that Petitioner failed to report receipts from a business bank account in the Mellon Bank, N.A., (hereinafter "Mellon Account") in Pittsburgh, Pennsylvania, resulting in the additional taxable income set out in the three counts of the indictment.

Petitioner readily admitted that he did not include the Mellon Account receipts in the preparation of Petitioner's tax returns, and in taking the stand in his own defense explained that during the prosecution years he had two principal business accounts, one at Mellon Bank, N.A., and one at Pittsburgh National Bank, (hereinafter "PNB Account"). Petitioner testified that the PNB Account receipts and expenses dealt with his Company's (AFC Electronics) old business concept of servicing and selling parts and other equipment, and that the Mellon Account was a "wash" account into which went receipts relating to Petitioner's new business concept involving an advertising program that would boast that AFC Electronics could match the

lowest prices of any competitor. Petitioner stated that all receipts from such "new" business would be placed into the separate Mellon Account in an effort to gauge whether and how much such an advertising program would result in losses. This Mellon Account was projected as a break even account and consequently, while said receipts were not as such included in the tax returns of Petitioner for the prosecution years, an analysis of the Mellon Account by Petitioner's expert, a former IRS Special Agent, would reveal that there was no additional taxable income.

B. Cash and Accrual Cross-Examination

Petitioner sought to demonstrate that he had no criminal intent to evade

and defeat his income taxes for the prosecution years because the Mellon Account was nothing more than a "wash" or break even account.

Petitioner was using the cash method of reporting his income. The Government, during presentation of its evidence, elicited testimony from Petitioner's former accountant that the gross receipts for the year 1976, a non-prosecution year following the last prosecution year of 1975, were higher than Petitioner's gross receipts in his 1975 tax return.

To rebut any criminal inference and at the same time to advance the defense that Petitioner had no criminal intent to evade or defeat his income taxes for any year, including 1975, the only year's count of which he was

convicted, defense counsel first sought, on cross-examination, to have Petitioner's former accountant explain the difference between the cash method and accrual method only as they related to Petitioner's contention that the Mellon Account was nothing but a "wash" account. Thus, although money for sales in this "wash" account was obtained in a given year, payment was not made until the following year, resulting in a total setoff, and therefore arguably negating any criminal intent.

The Government objected to this line of cross-examination,which the Trial Court sustained, we contend, in derogation of Petitioner's right to confront and cross-examine witnesses, a fundamental aspect of procedural due process under the Fifth Amendment. Jenkins v. McKeithen, 395 U.S. 411 (1968).

C. Examination With Respect To 1976

Petitioner's counsel then endeavored to cross-examine the accountant with respect to the 1976 Tax Return, a non-prosecution year, to buttress Petitioner's contention that the Mellon Account was nothing but an in and out account and the inference that Petitioner had no intent to evade and defeat his taxes.

The Trial Court thwarted this cross-examination and direct examination of Petitioner and his expert in the apparent misconception advanced by the Government that Petitioner was seeking to vary his method of accounting from the cash method to the accrual method.

Petitioner was not endeavoring to prove that he could have reported his

income by accrual rather than cash, but rather his defense that he had no criminal intent to evade or defeat his taxes because he treated the Mellon Account as a "wash account", and thus not taxable.

In United States v. Moody, 339 F.2d 161 (6th Cir. 1964), the Trial Court permitted the introduction of net worth charts by the defendant showing that he owed no tax for the prosecution years, to negate "wilfulness", supra at p. 162. Moody, a highly instructive and apt opinion, used the bank deposit method of proof, as used in this tax evasion case.

Judge Prettyman writing for the Court in Moody, reversed the defendant's conviction and held that while it agreed that the records were in fact admissible

on the issue of defendant's intent or wilfulness, the Trial Court's limitation of the record was error and that the record should have been admitted,

> Taxpayer-defendant's proffered proof consisted in part of a purported net worth study covering the four years involved. The trial court took the view that this case was a bank deposits case and that a net worth computation was irrelevant and therefore inadmissible, except for the purpose of showing lack of willfulness. But the terms "bank deposits case" and "net worth case" are not descriptive of the case itself. The case itself is a willful tax evasion case. The two quoted terms are descriptive of methods of computation. Either can be used by either the Government or the taxpayer as a means of computing income. The use of one method of computation by one party does not foreclose the use of another method by the other party. The trial judge was in error in his view in this respect.

(id., p. 162), (emphasis added).

Petitioner did not want to prove that the accrual method "could have" been used as Moody permits, even in a bank deposits case, but only that what he did, however wrong, was not done with criminal intent.

D. Willfulness - Intent To Evade Taxes

The Government must prove that the crime was "willful" as defined by this Court, i.e. "a voluntary, intentional violation of a known legal duty". United States v. Pomponio, 429 U.S. 10 (1976).

The critical issue sub judice related to the intent with which Petitioner did otherwise undisputed acts. Where that is the defense, an accused is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent.

Hoyer v. United States, 223 F.2d 134, 139 (8th Cir. 1955).

Nonetheless, the trial ruling, affirmed by the Circuit, prohibited the Petitioner from testifying to the reason he carried money into 1976, seemingly earned in 1975, but paid out as expenses the following year; denied him the right to cross-examine his former accountant to rebut a Government created inference that 1976 receipts (non-prosecution year) were greater because of the inclusion of the Mellon Account (1975 prosecution year receipts); and from inquiring of Petitioner's own expert with respect to the Mellon Account which carried over into 1976, an analysis of which would have demonstrated that it was in fact a "non income" item.

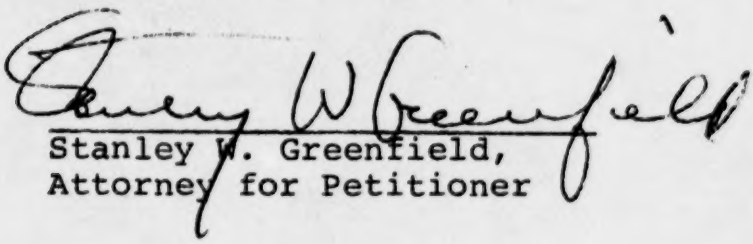
These prohibitions denied Petitioner due process as he was powerless to advance any corroborative contention that he had no intention to evade his income taxes for the single year (1975) of which he was convicted. The prejudicial effect of this continued restrictive ruling by the Trial Court is thus obvious.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

GREENFIELD & MURTAGH



Stanley W. Greenfield,
Attorney for Petitioner

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 1981, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS UNITED STATES MAIL, POSTAGE PREPAID:

1. Wade H. McCree, Jr.
SOLICITOR GENERAL OF THE UNITED STATES
United States Department of Justice
Washington, D.C. 20530

2. Thomas Daley, Esquire
Assistant United States Attorney
Western District of Pennsylvania
633 U.S. Post Office and
Courthouse
Seventh and Grant Streets
Pittsburgh, Pennsylvania 15219

GREENFIELD & MURTAGH

Stanley W. Greenfield,
Attorney for Petitioner

SWORN to and subscribed before

me this 2nd day of January, 1981.

Notary Public

My Commission Expires:

JANE C. DINDINGER, Notary Public
Pittsburgh, Allegheny County, PA.
My Commission Expires June 7, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1986

UNITED STATES OF AMERICA

v.

AUGUSTINE CASTELLI,

Appellant

(D.C. Crim. No. 80-00064)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Sumitted Under Third Circuit Rule 12(6)
Tuesday, November 4, 1980
Before: GIBBONS and WEIS, Circuit Judges and BECHTLE, District Judge*

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* Hon. Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation

JUDGMENT ORDER

Augustine Castelli appeals from a judgment of sentencing following his conviction on the charge of income tax evasion for the year 1975. He contends that the court erred in excluding from evidence his 1976 tax return and other evidence bearing on his criminal intent. We find no error.

It is O R D E R E D and A D - J U D G E D that the judgment of the district court is affirmed.

BY THE COURT,

/s/ John J. Gibbons
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: NOV -6 1980

No. 80-1106

In the Supreme Court of the United States

OCTOBER TERM, 1980

AUGUSTINE CASTELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Cases:

Clark v. *United States*, 211 F. 2d 100 4

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Constitution, statute and rule:

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1106

AUGUSTINE CASTELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for attempted income tax evasion on the ground that the trial judge erroneously excluded evidence bearing on his lack of criminal intent.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was acquitted on two counts of attempted income tax evasion for 1973 and 1974, in violation of 26 U.S.C. 7201, and convicted on a third count of attempted income tax evasion for the year 1975 (A. 2a).[1] The district court sentenced him to a four-year prison term, which was suspended on condition that petitioner serve 179 days in a "jail-type institution," placed him on five years' probation, and fined him $250 (*ibid*). The court of appeals affirmed (Pet. App. 1a-2a).

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[1] "A." refers to petitioner's appendix in the court of appeals. "Tr." refers to the trial transcript.

At trial, the government proved the understatement of taxable income and tax liability through use of the bank deposits plus cash expenditures method of proof. The government's expert accounting witness calculated, *inter alia,* that during 1975 petitioner's actual gross receipts exceeded his reported gross receipts by $749,933.24 (Tr. 122). He found that petitioner had unreported taxable income of $78,856.33 for 1975 and determined that his tax deficiency for that year was $31,498.57 (Tr. 121-123). An accountant who testified on behalf of petitioner conceded that, according to his calculations, petitioner had unreported taxable income of $58,743.97 for 1975, an amount almost twice as large as his reported taxable income ($32,662.79) for that year (Tr. 238).

1. Petitioner contends (Pet. 15) that "in derogation of * * * [his] right to confront and cross-examine witnesses" under the Sixth Amendment, the trial judge sustained the government's objection to a "line of cross-examination" of the preparer of his return (Donald Larva) regarding "the difference between the cash method and accrual method [of accounting] only as they related to * * * [his] contention that the Mellon Account was nothing but a 'wash' account." The so-called "Mellon Account" was a business checking account that petitioner opened in 1965 at the Mellon Bank (Tr. 65). When petitioner employed Larva to prepare his returns for 1973-1975, he turned over to Larva a checkbook relating only to a business checking account which he maintained at Pittsburgh National Bank (PNB), despite the fact that, during those years, he had deposited more into the Mellon Account than double the amount of receipts that he had deposited into the PNB Account (Tr. 20-21, 26). It was not until June 1976, after the Internal Revenue Service informed petitioner that he would be audited for 1974, that

he disclosed the existence of the Mellon Account to Larva (Tr. 26).[2] Larva testified (Tr. 28-29) that, after having been informed of the existence of the Mellon Account, he was compelled to recompute petitioner's income for the first six months of 1976. He then confirmed (Tr. 29) that the information from the Mellon Account "reflected additional income." It is with respect to this testimony that counsel for petitioner sought to elicit information from Larva regarding the accrual and cash methods of accounting in order "[t]o rebut any criminal inference and at the same time to advance the defense that Petitioner had no criminal intent to evade or defeat his income taxes for any year" (Pet. 14).

In sustaining the government's objection to cross-examination regarding the cash and accrual methods, the trial judge did not deprive petitioner of his Sixth Amendment right to confront and cross-examine witnesses. On cross-examination, Larva was permitted to describe the differences between the two methods of accounting (Tr. 30). The government objected only when it became clear that "defense counsel's questions * * * [were] designed to inject into the case the so-called shift of accounting method to try to minimize the unreported income or shift it from one year to another by changing the accounting method" (Tr. 31). Although petitioner had determined his income for the years in question on the cash basis of accounting (Tr. 19), at trial he attempted to prove lack of criminal intent by showing that disbursements from the Mellon Account cancelled out deposits under the accrual method of accounting, thus creating a "wash". However, the law precludes proof that a

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[2]Larva testified (*ibid.*) that "before that date [of audit] came about, Mr. Castelli called me into his office, and he said 'Don, you're in the clear', something to that effect, 'but I have another checkbook that I never gave you.' "

different method of accounting, such as the accrual method, could have been used, because the offense charged must be weighed against what was done, and not against what might have been done. See, *e.g.*, *Fowler* v. *United States*, 352 F. 2d 100, 103 (8th Cir. 1965); *United States* v. *Vardine*, 305 F. 2d 60, 64 (2d Cir. 1962); *Clark* v. *United States*, 211 F. 2d 100, 105 (8th Cir. 1954). At all events, the trial judge did not foreclose Larva from testifying as a defense witness to describe the differences between the cash and accrual methods; in fact, he suggested that defense counsel call Larva as an expert (Tr. 34). However, after serving a subpoena upon Larva (Tr. 60, 63, 141-142), the defense chose not to call him.

2. Petitioner further contends (Pet. 16) that the trial judge improperly precluded him from cross-examining Larva with respect to his 1976 tax return "in the apparent misconception advanced by the Government that Petitioner was seeking to vary his method of accounting from the cash method to the accrual method". But the record shows that the trial judge sustained the government's objections to the introduction of evidence as to the 1976 return both during defense counsel's cross-examination of Larva (Tr. 58-59) and during his direct examination of petitioner (Tr. 154, 156, 160, 164, 167, 183) because such evidence concerned a year (1976) other than one of the prosecution years. As we have noted (*supra*, pages 2-3), Larva's discovery of the Mellon Account required him to recalculate income for the first six months of 1976. The 1976 return would not have been prepared until some nine or ten months later and could not have shed any light on petitioner's intent when he filed the returns for the indictment years.[3]

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[3] *United States* v. *Moody*, 339 F. 2d 161 (6th Cir. 1964), upon which petitioner relies (Pet. 17-19), is not to the contrary. There, the government used the bank deposits method to prove an understatement of

3. Finally, petitioner argues (Pet. 20-21) that all of the trial court's exclusions of evidence denied him due process "as he was powerless to advance any corroborative contention that he had no intention to evade his income taxes for the single year (1975) of which he was convicted." The record, however, shows that petitioner testified (Tr. 142-215) at length regarding his intentions in opening and using the Mellon Account and his reasons for computing gross receipts for his return preparer in the unusual manner in which it was done.

At all events, even on the assumption that the trial judge erred in excluding such evidence, that error was harmless under Rule 52, Fed. R. Crim. P., in view of the overwhelming evidence of petitioner's guilt on Count Three of the indictment. By the admission of petitioner's own expert, after making a number of doubtful exclusions of alleged non-income items from total deposits, there still was unreported taxable income for 1975 in the sum of $58,743.97, a figure almost twice as large as reported taxable income for that year ($32,662.79) (Tr. 238). Furthermore, petitioner not only concealed vital information from Larva (see *United States* v. *Pepe*, 360 F. 2d 1015, 1016-1017 (3d Cir. 1966); *United States* v. *Daniels*, 617 F. 2d 146, 149 (5th Cir. 1980)), but he also supplied him with false figures as to his

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income. The trial judge in *Moody* erroneously refused to admit, except to negate willfulness, a net worth computation showing no understatement of income and that the defendant owed no tax for the indictment years. Here, however, petitioner did not offer a net worth computation to dispute the proof that he had understated income and that there existed a tax deficiency in the indictment years, but rather used the same method of proof as the government, *i.e.*, the bank deposits method. *Moody* does not support a defense based upon a hypothetical shift from the cash to the accrual method of accounting, nor is it authority for the introduction by the defense of returns for years other than indictment years.

monthly gross receipts. Such deception resulted both in the understatement of income on his federal income tax returns, and in the understatement of his gross sales on the sales tax returns filed with the Pennsylvania Department of Revenue (Tr. 20-24). See *Spies* v. *United States,* 317 U.S. 492, 499 (1943); *Holland* v. *United States,* 348 U.S. 121, 139 (1954). The admission of all of the evidence cited by petitioner would not have lessened the impact of the substantial proof of petitioner's guilt and would not have affected the jury's verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981